United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-2038

To Be Argued By
JOSEPH I. STONE

B
P/S

UNITED STATES COURT OF APPEALS

for The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

PETER CORSO,
Defendant-Appellant.

74 Civ. 720
71 Cr. 1184

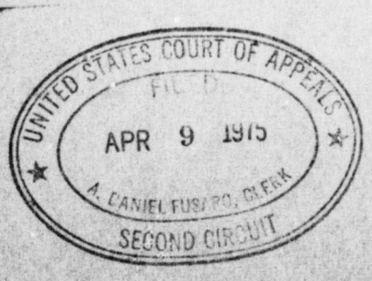
Southern District of New York
to
Second Circuit

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT

PETER CORSO



JOSEPH I. STONE
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Office & P. O. Address
277 Broadway
New York, New York 10007

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -v- PETER CORSO, Defendant-Appellant.	No. 75-2038

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT
PETER CORSO

JOSEPH I. STONE
Attorney for Appellant
277 Broadway
New York, New York

TO: PAUL J. CURRAN, ESQ.
United States Attorney
Southern District of New York
United States Courthouse
Foley Square, New York 10007

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PRELIMINARY STATEMENT

The defendant-appellant, Peter Corso, appeals from the original judgment of the United States District Court, Southern District of New York, before Hon. Edward Weinfeld, without a jury, entered on March 3, 1972, for the crimes of violating the narcotic laws, Title 21, Sections 846, et al. The appellant was sentenced on March 3, 1972, to a term of five years imprisonment in addition to a term of special parole and consecutively with a parole violation in the State Court, State of New York. Defendant also appeals from a denial of his motion under Section 2255 to vacate the sentence and conviction and after a hearing of August 19th, 20th and 21st, and a decision of December 23, 1974, denying said motion.

The Court ordered the clerk to file a notice of appeal on behalf of Corso, which was never done according to all the files I have looked at and according to the records of the District Court and the Circuit Court of Appeals. The issues brought forth at trial were preserved for the evidentiary hearing and accordingly, it is felt that these issues are merged in the enclosed appeal.

The defendant was released from federal custody approximately one month ago, is currently paroled to the state authorities and upon information and belief, is still in custody some place in Georgia.

The defendant desires to prosecute this appeal and the undersigned was appointed in July, 1974, under the Criminal Justice Act and this appointment was continued by the Circuit Court of Appeals.

STATEMENT OF FACTS

At Corso's non-jury trial in 1972, police officers D'Ambrosio, Nunziata, Pons and others testified about the surveillance of Corso, also known as Carbone, and co-defendant Johnston. Prior to trial, Johnston pleaded guilty and was never called as a witness by either the government or the defendant.

During the course of the trial, D'Ambrosio testified about his undercover work with Johnston and overhearing a conversation on the telephone in Johnston's house concerning the fact that Johnston was to receive "some shirts". D'Ambrosio testified only about the portion of the conversation that he could overhear and was not aware of who the caller was until Johnston allegedly told him that it was his "man Carbone".

After this conversation, a buy of narcotics was arranged and the defendant, Corso, was seen approaching Johnston's area, alight from a car, go into the trunk of his car, take out a travel bag, hand the travel bag to Johnston, whereupon both Johnston and Carbone were arrested. A motion to suppress was conducted before Judge Weinfeld, who denied the motion, stating that the agents had ample probable cause. On questioning of the officers, trial counsel asked whether a wiretap was present at Johnston's residence or Carbone's and received a negative response. After receiving this negative response, he did not go into any other details concerning the overheard phone conversation. The defendant was convicted on what appeared to Judge Weinfeld to be substantial evidence and he offered no defense at the time of trial.

Some time afterwards, the defendant became aware that there were many illegal wiretaps conducted by police officer Leuci and the government, in answer to the defendant's 2255 motion, admitted the illegality of certain wiretaps but claimed they had no bearing on the defendant's conviction and case. It was on the basis of this concession that Judge Weinfeld granted a hearing.

The undisputed facts are as follows:

1. Corso was convicted of being in possession of three kilograms of heroin on October 5, 1971, and his arrest was made without a warrant.

2. Corso's trial counsel, Albert Krieger, requested in his demand for certain particulars that the government unequivocally state whether or not Corso was the subject of a wiretap.

3. John Walker, the assistant who prosecuted this case, admitted receiving Mr. Krieger's bill of particulars, answered in the negative and testified at the hearing that his inquiry did not include asking supervisors of the arresting agents whether a wiretap existed (9, 10R).

4. Michael Shaw testified as to the procedures used within the Department of Justice to ascertain the existence of a wiretap (139R) but Mr. Walker did not testify that he utilized these procedures.

5. Attorney Albert Krieger testified that he had a discussion with Corso about the existence of the wiretap (13R) and they would have handled the motion to suppress differently if he knew of the existence of wiretaps (14, 15R) and he would have conducted the entire cross-examination differently (21R).

6. There is no dispute that the main surveillance witness at Corso's trial, DetectiveNunziata, is dead, is considered a suicide, was under investigation at the time of his suicide (55R) and perjured himself in Corso's trial.

7. Leuci admits discussing Corso with Nunziata (37R) and considers Corso and Carbone as one and the same person (43R).

8. Leuci stated that Corso's parole officer knew of the investigation (43R) and that Detectives Sheridan, Glazier and Sergeant Cohen also knew of the illegal wiretaps (45-47R).

9. Leuci heard Bless and Corso many times over the illegal tap (73R).

A conflict in testimony and several disputes as to the tape occur in both direct and cross examination of other witnesses. For example:

Leuci stated that Shaw and Scopetta knew that the tap was on Corso's phone (78R). Shaw and Scopetta remember the name "Bless" more than they knew the name Corso. Leuci stated that other federal agents knew that Corso's name appeared on the tape and that prior to the Rosner trial (November 1972), Assistant U.S. Attorneys Sagor and Guiliani also knew (107R).

Leuci also testified that he "blew his cover" around October 21 or 22, 1971, and came to the U.S. Attorney's office to meet Shaw and Scopetta along with Lammittina (110-112R), although Shaw and Scopetta seem to remember this meeting as being on Christmas Eve (129R).

As far as Leuci was concerned, Corso and/or Carbone was the target of the investigation (257R).

The government also offered as witnesses for the benefit of the petitioner, Detective Carl Aguilez and Detective Louis D'Ambrosio. Aguilez admits tapping the phone of co-defendant Merrit Johnson in early 1971 (181-182R). Detective D'Ambrosio stated that he was aware of the Aguilez wiretap (194R) but this tap was active about the last week of August or "the middle of September or thereafter" (209R) and later he states that the Aguilez tap was removed less than a week before he began his investigation and possibly only a few days (211R).

The government conceded that the tapes of the Aguilez tap and the Nunziata tap are unavailable (212R). D'Ambrosio admitted to committing perjury concerning the wiretaps and completely misleading defense counsel (196-199R). D'Ambrosio differs with Leuci as to the meeting

in the Market Diner and whether it was a few days after the arrest or sometime in Novemb . (216R). D'Ambrosio had no idea how long the Nunziata tap remained on Johnson's telephone (222R).

Sergeant Pitruzzello testified that he was aware that S.I.U. agents used wiretaps and were conducting an independent investigation of Corso (235-237R) but he made no attempt to find out the results of anyone else's investigation. He also stated that D'Ambrosio did not tell him that he heard the name Carbone prior to the arrest of Corso (237R). Detective Lamattina adds more conflict to the existing situation by stating that he was aware of these illegal wiretaps and had conversations with U.S. Attorneys concerning them in 1971 and 1972 and that he discussed this with Assistant U.S. Attorney Sagor (270-272R).

The government stipulated that the secrecy involving these wiretaps was so that they could investigate the extortion conduct of police officers, hoping to bring them into court for using wiretaps illegally or for violating Civil Rights of a particular individual. At the time of the hearing (three years after the illegal wiretaps had ceased to exist) the government had not obtained any indictments of polic officers for violating

the Civil Rights of any individual (285R). Three weeks ago, according to newspapers accounts, Officers Sheridan and Glazier were indicted for violating Bless's constitutional rights.

Judge Weinfeld, in an exhaustive 22 page opinion dated December 23, 1974 (attached to appendix hereto), elaborated most of the above facts, accepted some, analyzed others and succinctly set forth what he believed to be the compelling reason for denying petitioners application for a new trial. Judge Weinfeld agreed that the government through Nunziata and D'Ambrosio had committed perjury with respect to the wire taps. He alsc found that the perjury, when committed, was not known by any member of the staff of the United States Attorney. Judge Weinfeld, felt, however, that even Nunziata and D'Ambrosio were cross examined and impeached as government witnesses, the jury would have still found that the defendant was guilty. Since this was a "bench trial, greater certitude of judgments can be expressed". (page 21, Opinion). It is from this subjective reasoning that petitioner Corso desires to appeal.

POINT I

PURE PERJURY REQUIRES AN UNEQUIVOCAL REVERSAL OF CONVICTION

Appellant submits that he is within the ambit of the "new trial" standards of such cases as U.S. v. Kahn, 472 F. 2d 272, which were approved by this court in U.S. v. Marquez, 363 F. Supp. 802, aff'd. 490 F. 2d 1303. Further, that the perjury herein was of sufficient materiality and importance to make pertinent the more liberal rule of U.S. v. Polisi, 416 F. 2d 573, 577. Any limitation on the Polisi standard to cases of "prosecutorial misconduct" (U.S. v. DeSapio, 435 F. 2d 272, 286, N.Y., cert. denied 402 U.S. 999, 91 S.Ct. 2170, 29 L.Ed.2 166) should not apply herein.

Since officers, government agents, placed the illegal wiretaps and committed perjury as to this existence, the government must be answerable for harm done to the appellant (Pyle v. Kansas, 317 U.S. 213; Barkee v. Warden, 331 F. 2d 842). This is particularly so where the offi cers were active in the case preparation (Imbler v. Craven, 298 F. Supp. 795).

The very important, very necessary and very secret investigation of police corruption, out of which the pertinent wiretaps arose, cannot excuse the government

of misconduct at the expense of appellant. The right of the President and Attorney General to authorize illegal taps (U.S. v. U.S. Dist. Ct., E.D. of Mich., S.D., 407 U.S. 297, 92 S.Ct. 2125) has not been extended to lower levels of government and offenses less than treason or subversion. It is respectfully submitted that these wiretaps and their consequences cannot rise above their basic illegality merely because they were withheld from the appellant and not offered into evidence.

The defense in the Corso case was based upon the blanket, unequivocal statement of the government that no wiretaps existed. In U.S. v. MELE, 462 F. 2d 918, Justice Clark, writing for the Second Circuit, ordered a new trial and stated that, "Since the withheld evidence and the doctored reports were highly material to this case and would so clearly have affected the preparation of a defense," reversal was necessary. The knowledge of the illegal wiretaps was the main issue in a demand for bill of particulars. The government's failure to conform to the standards set forth by this Circuit and by the Supreme Court of the United States require further adoption of what Justice Clark said in Mele, supra:

> "The very least required of the government was a complete disclosure of the truth to the District Court in camera so that the balance of interest could be struck by one not involved in the all too 'often competitive enterprise' of prosecution", U.S. v. Varelli, 407 F. 2d 735.

Judge Byrne, in U.S. v. Ellsberg, considered the misleading of the defense by unequivocal government statements sufficient to grant the defense's motion to dismiss the indictment. Certainly, in this case, we have an equivalent factual situation.

It would be very difficult for a judge, especially a learned scholar and experienced jurist, to predict how a jury would decide a particular case. Today's atmosphere of illegal government activities, illegal wiretapping, and rampant perjury on the part of many government investigators could present a different jury atmosphere than what was existent in the court several years ago.

There are no statistics as to how jurors decide particular cases and lawyers and judges can only go on their personal experiences to urge the appellate courts to let the juries decide the facts, especially when there are many "misstatements of fact" made by government agents.

I was the trial counsel in a very recent case before Hon. Marvin Frankel (U.S. v. Marquez) and after

two days of deliberations, the jury acquitted both defendants on trial. It seems that several government agents and/or informers were caught in a series of minor inconsistencies, some bordering on absolute lies and others on possible issues of mistake. Nevertheless, in the teeth of a rather strong government case, the jury seemed interested in the misstatements, misleading items of testimony and lies and acquitted both defendants. It was my impression that the lies were not material to the innocence or guilt of the defendant but were rather lies about innocuous items of surveillance and prior meetings and in a pure judicial scientific analysis of the facts would not have caused a factfinder to acquit. Nevertheless, juror deliberations are subjective in nature, not subject to analysis and I find it difficult for any court to decide what a jury would do with a given set of facts. The past history of jury deliberations would not give us enough scientific evidence in which to predict their outcome.

In a retrial of this case, defense counsel can show that the government's main witnesses are convicted felons, admitted perjurors, illegal wiretappers and attempted extortionists. With these facts before a jury, it is doubtful if even God will know what their verdict will be until it is rendered.

CONCLUSION

WHEREFORE, it is respectfully requested that the judgment of conviction in the above-entitled case be reversed and the indictment dismissed.

Respectfully submitted,

JOSEPH I. STONE
Attorney for defendant-appellant
277 Broadway
New York, New York 10007

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGE WERKER

71 CRIM 1184

----------x

UNITED STATES OF AMERICA, : INDICTMENT

-v- : 71 Cr.

PETER CORSO, a/k/a Peter Carbone, and MERRITT C. JOHNSTON,

Defendants.

----------x

The Grand Jury charges:

1. From on or about the 1st day of September, 1971 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

PETER CORSO, a/k/a Peter Carbone, and
MERRITT C. JOHNSTON,

the defendants and others to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of

JMW,Jr:rs
71-3014

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about October 5, 1971, PETER CORSO drove a car in the vicinity of Downing Street, New York, New York.

2. On or about October 5, 1971, PETER CORSO and MERRITT C. JOHNSTON left the building at 46 - 48 Downing Street, New York, New York.

3. On or about October 5, 1971, MERRITT C. JOHNSTON carried a bag in the vicinity of 46 - 48 Downing Street, New York, New York.

(Title 21, United States Code, Section 846)

USA-33s-527A - IND/INF - Distrib. Possess Narc. Drug (Succeeding Count)
Ed. 5/10/71

JMW,Jr:rs
71-3014

SECOND COUNT

The Grand Jury further charges:

On or about the 5th day of October, 1971, in the Southern District of New York,

PETER CORSO, a/k/a Peter Carbone, and
MERRITT C. JOHNSTON,

the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 3,010.5 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

Foreman

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

EB 3 1972 Trial continued and concluded.
Deft. Corso found guilty by the court
on Count # 1 and 2.. P. S. R. requested.
For sentence March 8, 1972

AR 8 - 1972 D.G. (PB) Weinfeld J.

FENDANT: MERRITT C. JOHNSTON (AUSA J.M. Walker + Edward Panger, Esq present) Sentenced on COUNT #2 to imprisonment for a period of wo (2) YEARS with objective that Defendant learn a TRADE.
~~Special condition upon release~~
Special Parole 3 yrs.
Ct 1, dismissed on motion of dft's counsel with consent of the Govt.
Dft contd on present bail of $15,000 until 3/10/72 at noon at which time dft to surrender to U.S. Marshal for service of sentence
Weinfeld J.

Dft Corso - sentence adjd to 3/13/72. Weinfeld J.
RW

R 15 1972

FENDANT: PETER CORSO (AUSA J. M. Walker + Arthur Baily, Esq present) entence on each of Counts #1 + #2 to imprisonment for FIVE (5) ARS to run concurrently with each other.
Special Parole 3 years. REMANDED. Appeal to be filed
WEINFELD, J.
(RW)

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE WEINFELD
71 CRIM. 1184

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U. S.:*
vs.	JOHN M. WALKER, JR., AUSA
PETER CORSO a/k/a Peter Carbone	
MERRITT C. JOHNSTON	
	For Defendant:

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
			3/16/72	A. Bailey	5 —	
J.S. 2 mailed ✓	Clerk		3/17/72	4 St read.		5 —
J.S. 3 mailed	Marshal					
~~XXXXXXX~~Comp. #71-3014	Docket fee					
Title 21						
Sec. 812,841(a)(1)841(b)(1)(A) & 846						
Possess with intent to distribute (heroin,I)(ct.2) conspiracy so to do(ct.1) TWO COUNTS						

DATE	PROCEEDINGS
10-15-71	Filed Indictment.
10-19-71	Peter Corso- No appearance by counsel. Adjourned to 10-26-71. Deft. remanded in lieu of bail fixed at $50,000.00
	Merritt C Johnston- No appearance by deft. Adjourned to 10-26-71. (Bail continued at $15,000.00) WYATT, J.
10-26-71	MERRITT C. JOHNSTON-Court directs entry of not guilty plea. Bail cont ($15,000) Motions ret in 10 days.
	PETER CORSO-Court directs entry of not guilty plea. Remanded in lieu of bail previously fixed. MacMAHON, J.
11-4-71.	Peter Corso- Filed affidavit and notice of motions for inspection.
11-10-71	P.CORSO- filed Govt's affdvt in opposition to the motions of deft for discovery, bill ofparticulars. WEINFELD, J.

DATE	PROCEEDINGS
11-12-71	Filed memo-endorsed on motion dtd 11-4-71., "Motion disposed of as indicated in martin notations and they constitute the order of the Court." (mailed notice) WEINFELD,J.
2-9-71	Hearing held and concluded. Trial 12-27-71 at 10AM. in rm 1305. Judge Weinfeld
12-28-71	Hearing held and concluded. Trial set for 2-2072. Weinfeld,J.
2-20-71	M.C. Johnson- Filed deft's attorney affidavit of actual XXXXXXXXXt engagement.
2-29-71	Filed memo. endorsed by Judge Weinfeld,dtd. on application for adjmt. of trial date, Trial was adjourned to 2-20-72.(see file)
-1-72	M?C. Johnston- Filed Order signed by Ch.Judge Edelstein, extending bail limits to include S.D. of N.Y., Eastern Dist. and the Stste of New Jersey.(mailed notice(see file)
2-2-72	Deft Johnson- Hearing held deft. pleads guilty to ct. 2. Bail cont'd. at $15,000 P.S.R. requested sentence March 8, 1972. at 10:A.M. Deftxx
2-2-72	Deft. Peter Corso- Waive trial by jury. Trial begun.
2-3-72	Trial continued and concluded. Deft. Corso found guilty by the court on ct. 1 & 2 pS. R. requested for sentence March 8, 1972 Weinfeld. J.
2-72	Corso- Filed waiver of trial by jury-Apporved by Weinfeld,J.
7-72	Corso- Filed copy#38235 Finding of facts and opi-nion: by Judge Weinfeld, ***** "Accordingly, the defendant is found guilty. The foregoing shall constitute the Court's Findings of Fact.(see file)
-8-72	MERRITT C. JOHNSON - Filed Judgment(Atty.present) defendant is hereby committed to the custody of the Atty.Gen'l.for a period of TWO(2)YEARS on count 2, with the objective that the deft.learn a trade. Pursuant to the provisions of Section 841 of Ti.21,U.S. Code,deft is placed on Special Parole for a period of THREE(3)YEARS to commence upon expiration of confinement. Ct.1 is dismissed on motion of defendant's counsel with consent of the Govt.Deft.cont'd on present bail until 3-10-72 at noon at which time deft.is to currender to the U.S.Marshal for service of sentence...WEINFELD,J. Issued commitment and copies.
-15-72	XXXX PETER CORSO-Filed Judgment(Atty.present)It is Adjudged that the deft.is hereby committed to the custody of the Atty.Gen.or his nauthorized representative for imprisonment for a period of FIVE(5)YEARS on each of counts 1 and 2, to run concurrently with each other....Pursuant to the provisions of Section 841 of Ti.21,U.S.Code, the deft.is placed on Special Parole for a period of THREE(3)YEARS, to commence upon expiration of confinement...xxxxxxxzxzxxzxzxxIssuedxcommitmentxandxcopiesx. This sentence is independent of, and consecutive to,any other sentence the defendant may be required to serve for violation of his state parole. E.W. Issued commitment and copies.... WEINFELD, J.
3-20-72	PETER CORSO-Filed notice of appearance by Arthur W. Baily,25W43 St.NYC
4-6-72	Filed Commitment & entered return, Deft. Delivered to the Fed. Det. Hdqrts NY 3-8- , 10-6-71

DATE	PROCEEDINGS
6-27-72	Filed endorsement attached to deft. letter for reduction of sentence Motion denied Weinfeld, J.
7-10-72	P. Carbone ~~Commitment & mittimus returned, Deft. Delivered to the~~ Warden, Fed. Det. Hdqrts. N.Y. for service of sent 3-15-72
6-23-72	~~Filed~~ Transcript of record of proceedings, ~~dated~~ 2-2, 3 and 3-15-1972
4-6-73	Corso-Filed magistrate's papers, Docket sheet, criminal complaint, disposition sheet, notices of appearance, appearance bond $5,000 cash, temp. commitment.

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE WEINFELD

1-22-75

Jury demand date:

74 CIV. 720

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
PETER CORSO, Petitioner, - against - UNITED STATES OF AMERICA, Respondent.	For plaintiff: Peter Corso pro se, Box PMB, Atlanta, Ga. 30315; Joseph Stone, 277 B'way, NYC 10007
	For defendant: US Atty.

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk					
J.S. 6 mailed	Marshal					
Basis of Action: Habeas Corpus	Docket fee					
	Witness fees					
Action arose at:	Depositions					

PETER CORSO V. U.S.A.

74 CV. 720

DATE	PROCEEDINGS	Date Or. Judgment
Feb.13-74	Filed Motion to Proceed in Forma Pauperis, for vacating sentence.	
Feb.13-74	Filed Order that petitioner be permitted to proceed in forma pauperis w/o prepayment of fees or costs - Carter, J.	
Mar.11-74	Filed defts.(respondent) affdt. of Howard Sussman in responde to petitioner's petition pur. to 28USC2255.	
Apr.1-74	Filed petitioners affdt. for assignment of counsel and adj. of disposition of petitioners petition be denied.	
Apr- 8-74	Filed defts. affdvt. re pro-se petition.	
Apr. 19-74	Filed petitioner's traverse to affdt. of Michael B. Mukasey.	
May 3-74	Filed defts. affdt. of Michael Mukasey.	
May 7-74	Filed memo end. on defts. affdt. dated May 3, 1974 of Michale Mukasey--Application granted exce pt that govt. is to make its determination by May 13, 1974. Weinfeld,J. (notice mailed)	
May 13-74	Filed respondents affdvt. of Michael Mukasey re plaintiff's petition	
May-13-74	Filed respondents memorandum of law.	
May 13-74	Filed memorandum of law in response to affdt. of Michale Mukasey bypetitioner.	
Jun 6-74	Filed petitioner's(pltf.) responde to affdt. of Michael Mukasey.	
Jul-16-74	Filed MEMORANDUM that the Court hereby appoints Joseph Stone, Esq., to represent petitioner upon a hearing, but will defer consideration of the scope of the hearing until counsel so appointed has an opportunity to familiarize himself with the record and to be heard. Weinfeld, J. m/n	
Aug. 16-74	Filed defts. affdt. of Michael Mukasey for w/h/c ad testificandum, writ issued,ret on: Aug. 20,1974.	
Aug.20-74	Filed one envelope sealed by order of the court and placed in the vault,Rm. 602,Cashier's Office.This envelope contains respondent's exhibit 3500A and not to be ordered until further order of the court.Weinfeld,J.	
Aug.19-74	Hearing begun.	
Aug.20-74	Hearing contd.	
Aug.21-74	Hearing contd. and concluded. Decision Reserved. Briefs to be submitted on Sept. 10,1974 and Sept. 24,1974.	
Sep.16-74	Filed writ of habeas corpus that Nicholas Lamattina appear in court on Aug. 20,1974.Weinfeld,J. and said writ was satisfied on Aug. 28,1974.Owen,J.	
Sep.25-74	Filed respondent's memorandum of law.	
Nov.18-74	Filed CJA form #20 for appointment and authority to pay Joseph Stone for evidentiary hearing on 9/13/74 in the amt. of $770.00.Weinfeld,J.	
Dec.23-74	Filed OPINION # 41615 ---Petitioner moves to vacate the judgent of conviction,dismiss indictment or alternatively for a new trial--- Motion is denied in all respects. Weinfeld,J.(~~to pro-se for~~ notice) mailed	
Dec.23-74	Filed petitioner's memorandum of law.	
After Jan 75	Filed Transcript of proceedings, dated Aug 19, 20, 21, 1974	
1-27-75	Filed Defendant-appellant appeal to U.S. Court of Appeals, 2nd Circuit from a decision dated Dec 23, 1974 - Copy to Warden, U.S. Pen Atlanta, Ga. 1-21-75 leave to appeal forma pauperis granted.Weinfeld,J.	
3-19-75	Filed USCA order-By notice of motion dated 2-18-75 Joseph Stone is to be continued as counsel on appeal under CJA. The time to extend in docketing the record is denied. The record shall be docketed on or before April 10, 1975. Appendix to contain copy of docket entries below & opinion of the dist. court. Counsel may remove the record for use until the	

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Judgm
not met	by appellant the Clerk shall dismiss the appeal forthwith. Appellee's brief and appendix if any shall be filed by May 8, 1975.	
Apr 2-75	Filed stipulation that action 71 Cr. 1184 (USA vs CORSO) be transmitted to USCA as part of the record on appeal of this action.	

Excerpts from Testimony

J O H N M. W A L K E R, JR., called as a witness, having been first duly sworn, was examined and testified as follows:

CROSS EXAMINATION BY MR. STONE:

(9R) Q Did you inquire as to any of the supervisors of the Joint Task Force as to whether or not there was a wiretap in existence on the phone of Peter Corso?

A No, I didn't.

Q In Conducting your pretrial in this case, did you inquire of the New York City police officers as to their prior experience with wiretaps?

A No.

(10R) Q Did you, as the prosecuting attorney, contact anyone in the New York City Police Department to ascertain whether there was a wiretap on the premises on 7th Street that were occupied by Joseph Corso?

A No, I didn't.

A L B E R T K R I E G E R, called as a witness by the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. STONE:

(13R) Q Did Mr. Corso at any time imdicate to you that he thought he was the subject of a wiretap?

A I know that we discussed wiretap, Mr. Stone. I don't recall whether he brought it up or I brought it up, but we did discuss the possibility of his conversations being overheard by a wiretap.

Q But you did make an application to the United States Attorney for certain particulars, is that correct?

A That's correct.

Q One of those particulars asked for a statement as to whether or not wiretaps were in existence, is that correct?

A Yes, sir.

Q And you were aware from reviewing the indictment that this defendant was charged with a conspiracy and with a substantive count of possessing narcotic drugs, is that correct?

A Yes, sir.

(14R) Q And in preparation for trial you felt that a motion to suppress would be in the best interest of your client, is that correct?

A Oh, yes.

Q Would you prepare a motion to suppress in a different manner if you were aware that a wiretap existed and your client was the subject of a wiretap?

A Yes.

Colloquy
(20R) THE COURT: How would your cross-examination have been any different?

THE WITNESS: The cross-examination would have been different, Number 1, your Honor, on the fact that the wiretap law seems to indicate
(21R) that the call was made to Johnston, Number 1.

Number 2, if I am not mistaken, there is already a predicate that there had been no wiretapping, no eavesdropping.

Number 3, if your Honor please, I believe that the shirt mentioned comes originally from Mr. Corso.

I think those three areas are pertinent. There is one conversation which I noticed in Petitioner's Exhibit 1 where Johnston does use the word "shirts." But I think the conversation to which my attention was invited deals with Corso using the word "shirts".

THE COURT: I don't see any date on this.

THE WITNESS: No, there are no dates or times, your Honor.

THE COURT: Does anybody have the dates?

MR. WALKER: No, your Honor.

R O B E R T L E U C I, called as a witness by the petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. STONE:

(37R) Q Did you have a conversation with Mr. Nunziata at any time in late September or early October 1971 where the name Peter Corso was mentioned?

A Yes.

(43R) Q You know them to be one and the same?

A As far as I was concerned from my investigation, Peter Corso, Peter Carbone was an alias for Peter Corso.

Q Did you ever discuss it with Nunziata or D'Ambrosio?

A No, sir.

Q How did that wiretap get on that particular phone?

A We had information that Peter Carbone, also known as Peter Corso, also known as Peter Carbone was in the apartment utilizing that telephone and --

Q When you say "we", who is we?

A Myself and the team of the detectives that I worked with.

Q Who are they?

A Detective Sheridan, Patrolman Glazier and a Sergeant Cohen. When we located the premises that Peter Corso was usin g, we installed a wiretap on the phone.

Q Did you know at thattime that Mr. Corso was on parole?

A Yes.

Q Did you advise his parole officer that he was the subject of your wiretap?

A Yes.

(45R) Q The only people that were aware of that wiretap were you and your two officers, fellow officers, is that correct?

A Myself, Sergeant Cohen, Patrolman Glazier.

(47R) Q Who kept possession of these four tapes?

A Detective Sheridan was holding onto the tapes.

(55R)

Q Detective Nunziata is dead at the present time, is that correct?

A Yes.

(73R)

Q How many times did you hear Bless and Corso talk over the telephone?

A Several times.

Q How many times did you ever hear Johnston and Corso ever talk over the telephone?

A Johnston you are referring to is "Chuck", I guess?

Q Yes.

A I just remembered that Chuck -- several times. To the best of my recollection I had conversations with Mr. Corso.

Q More than one?

A I think so. I am not sure.

CROSS EXAMINATION BY MR. WALKER:

(78R)

Q Did there come a time in approximately September of 1971 when you became aware of an illegal wiretap which was being placed by the special investigations unit on Peter Corso?

A Yes.

(79R)

Q Did you report that fact to Mr. Shaw and Scoppetta?

A Yes, sir.

THE COURT: What date was that?

Q Do you know the date, sir?

A The date that I reported it? I don't know the exact date. It was some time shortly after the installation of the wiretap.

RECROSS

(107R)

Q In 1972, at that time had you discussed with the U.S. Attorney the fact that there was an illegal wiretap on Bless and Corso?

A Yes.

Q Who were the U.S. Attorneys then?

A Elliot Sagor, basically -- I will say Elliot Sagor, really, at that time was the U.S. Attorney that was working with me along with one or two other U.S. Attorneys in a particular unit preparing cases for possible grand jury presentation. And the Bless case was one of those cases and I am not sure whether it was Elliot Sagor or it could have been Mr. Giuliani -- we discussed this case.

REDIRECT

(110R)

Q During these conversations with Mr. Sagor or other Assistants where the illegal wiretap was mentioned, did you or any of the Assistants discuss the fact that Corso might have had an appeal pending?

A No, sir.

Q Did you or any of the Assistants discuss the fact that Corso had recently been convicted in this court for violating the narcotic laws?

A No.

Q Do you have any personal knowledge as to when Mr. Lamattina decided to cooperate with Federal authorities?

A Yes.

(111R)

Q When was that?

A I would say some time in the latter part of October, again at a time when Detective Lamattine -- I was surfaced by Detective Lamattine.

THE COURT: I didn't hear the last one.

THE WITNESS: I was surfaced by Detective Lamattina at the time that I turned over these tapes to him.

THE COURT: What do you mean you were surfaced by him?

THE WITNESS: What happened --

THE COURT: Speak up, I can't hear you.

THE WITNESS: I am sorry. I turned over the tapes to Detective Lamattina in the portfolio that I gave him, and in it also was a memorandum from Nicholas Scoppetta to me asking me to update my paper work, to get my paper work going and he mentions Detective Lamattina as one of our targets. Detective Lamattina got that memorandum along with the tapes, read the memorandum and realized that he was in deep, dark trouble and about that time I had a confrontation with Detective Lamattina. He was brought in that particular night into the Southern District and at that time negotiations began with him whether or not he would cooperate. I think at that point in time he wasn't actively cooperating, but he was cooperating to the extent that he didn't blow my
(112R)
cover. So it is the latter part of October.

Q Who were the Assistant U.S. Attorneys that discussed this with Lamattina, if you were aware, if you know, sir?

A Assistant U.S. Attorney Michael Shaw, Special Assistant U.S. Nicholas Scoppetta.

Q That is all?

A That is all.

THE COURT: You say latter part of October, October of what year?

THE WITNESS: Of 1972 -- '71.

Q That is when you turned over the tape, is that correct?

A Yes.

Q And according to your memorandum that you just identified that would have been about October 21 or 22 of 1971, is that correct?

A Yes.

E D W A R D M. S H A W, Called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WALKER:

(129R)

Q Did any meetings occur in the United States Attorney's office, to your knowledge, during the period of the undercover investigation?

A Well, shortly before Christmas in 1971 we had an incident which resulted in Mr. Leuci's status being known by Lamattina and DeStefano, and I think Mr. Leuci was in the U.S. Attorney's office that night when we were

talking with him, but I am not -- no, I am sure he was that night, but only rarely, if ever, other than that until it went public, so to speak.

CROSS EXAMINATION BY MR. STONE:

(138R)

Q Is there any procedure at your office, referring to the United States Attorney's office, undertook when there was a request by any defense counsel to ascertain the existence of a wiretap? Did you circulate a memo from one agency to the other, did you circulate anything from one U.S. Attorney to the other or to a coordinated chief assistant?

A My best memory of the way it was done when I was in the United States Attorney's office was that there was a Department of Justice Attorney in Washington -- I think his name was Epstein -- who had the responsibility of receiving letter communications or in some cases oral communications from lawyers in the United States Attorney's office who received such motions and he then undertook to canvass all agencies. That I think is what the procedure was when I was there.

C A R L A G U I L U Z, called as a witness by the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WALKER:

(181R)

Q Did you install a wiretap on Johnston?

A I did.

Q What was the result of that wiretap?

A Negative results. The investigation ceased approximately two weeks after I installed the wiretap.

THE COURT: Can you fix a time? In 1971.

THE WITNESS: Early in 1971, your Honor.

THE COURT: You say the results were negative?

(182R)

A For myself, yes.

Q Did you report that back to Nunziata, that the results were negative?

A There came a time where I did tell Joe that I believed in my opinion that the investigation was negative. There was nothing there as far as I was concerned.

Q Did you cease the wiretap?

A Yes, sir.

Q Was any warrant obtained for this wiretap?

A No, sir.

L O U I S D' A M B R O S I O, called as a witness by the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WALKER:

(194R)

Q Did Mr. Aguiluz insert a wiretap, to your knowledge?

A Yes, he did.

(196R)

Q You testified in a trial in this courthouse before the same Judge on February 2nd and 3rd of 1972; is that correct?

A Yes.

Q Was the testimony that you gave at that proceeding pursuant to the direct examination of myself truthful and accurate?

A No, it was not.

Q No, pursuant to the direct examination of myself, my own questions, not questions asked to you on cross examination.

A Yes, they were, your questions were, yes.

Q I direct your attention to page 168 of that transcript. Starting with the third question from the top of the page, beginning with the word "Outside," and

following through to the answer "Oh, yes, if there was a wiretap, yes." Would you read those questions and answers at this time. To yourself.

(Pause.)

Q Have you read them?

A Yes, sir.

MR. WALKER: For the record, I think I
(197R)
should read them into the record, your Honor.

THE COURT: I think you should.

Q Page 168:

"Q Outside of the two conversations, two telephone conversations which you make reference to in your direct testimony here, are you aware of any other phone conversations to which Johnston was a party?

"A No.

"Q Was there a wiretap in this case?

"A No, there was not.

"Q You say that definitely of your own knowledge?

"A That's correct.

"Q Would you have known if there was one?

"A In what respect, counsel?

"Q Would you know -- would you, as one of the investigative agents, be aware of a wiretap?

"A Oh, yes, if there was a wiretap, yes."

Okay, do you recall giving those questions and answers at that time?

A Yes.

Q Were those answers truthful?

A No, they were not.

THE COURT: In what respect were they not truthful?

(198R) THE WITNESS: The first question was Johnston -- you know, the testimony, you know, that Johnston was a party of a conversation.

There was a wiretap but I didn't feel like this case, meaning the Corso case, there was none.

THE COURT: In what wiretap were you referring to? You have now said that the answer was not truthful. I take it that -- let's take them one by one.

The first question put to you was:

"Outside of the two conversations, two telephone conversations, which you make reference to in your direct testimony here, are you aware of other phone conversations to which Johnston was a party?"

Your answer was no.

THE WITNESS: That was untrue, your Honor.

THE COURT: In what respect was it untrue?

THE WITNESS: I had heard some conversation by Johnston from tapes of a -- derived from wiretap. I had listened to some conversations of Johnston on the phone as a result of the wiretap.

CROSS EXAMINATION BY MR. STONE:

(209R)

Q So Aguiluz was probably the first of September and the last week in August or the middle of September?

A Roughly the middle of September, or shortly thereafter.

Q Approximately how many weeks prior to the arrest of Corso and Johnston? Well, I'll put it this way:

It's been agreed by all parties here that Johnston and Corso were arrested October 5, 1971.

A It's hard for me to place a date. I know when I was undercover the wiretap was out.

Q Did the wiretap go out a week before you went undercover, two weeks before?

A I don't recall.

Q Could it have been as much as a month before?

A No.

(211R)

Q To the best of your recollection, was it a week before you began your investigation, two weeks or more?

A No, it was less than a week.

Q A few days?

A Possibly, yes.

(212R)
Colloquy

MR. STONE: I would ask the government to make a representation as to whether or not any of these reels are available, your Honor.

MR. WALKER: Your Honor, the government doesn't have any in its possession, these taps, and doesn't know whether the reels are available. I will make inquiry to confirm my own understanding that they are not available.

(216R)

Q When did you meet with Leuci and Nunziata after this arrest?

A When?

Q Yes.

A A few days later and then another occasion.

Q When did Leuci tell you there was a wiretap in this case?

A On the second occasion.

Q Approximately could you give us a point in time? Was it a month or two months after the arrest?

A It was -- the best of my recollection, some time in November.

(222R)
Q And the Nunziata tap?

A I have no idea how long it was on.

A N T H O N Y P I T R U Z Z E L L O, called as a witness by the government, being first duly sworn, testified as follows:

CROSS EXAMINATION BY MR. STONE:

(235R)
Q Did you ever advise the United States Attorney's office that there was another investigation taking place at about the same time by another group?

A I don't believe so, sir. I don't remember if we did or not.

(236R)
Q And you didn't report to any of your superior officers that there was a parallel police investigation
(237R) taking place?

A I don't remember formally telling anyone but I get the impression, if my memory serves me correct, that it became knowledge in the outfit that we beat SIU to the punch, so to speak.

Q In the Corso investigation?

A Yes, that we got to him first.

R O B E R T L E U C I, resumed the stand and testified further as follows:

CRCSS EXAMINATION CONTINUED BY MR. STONE:

(257R)

Q And the investigation was directed, was it not, to Peter Corso or Peter Carbone as far as you were concerned?

A As far as I was concerned, it was directed to Peter Corso, correct, yes.

N I C H O L A S L A M A T T I N A, called as a witness by the petitioner, being firstduly sworn, testified as follows:

DIRECT EXAMINATION BY MR. STONE:

(271R)

Q During that year, did you have discussions with any United States Attorneys concerning the illegal wiretaps?

A I believe once or twice. I believe once or twice.

(272R)

Q Which United States Attorneys?

A I think it was Mr. Sagor.

Q Was this prior to the time of the Edmund Rosner trial?

A Possibly. I'm not sure.

P E T E R C O R S O, called as a witness by the petitioner, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. STONE:

(285R)
Colloquy

MR. STONE: Your Honor, I think the government would also agree to stipulate that at the present time there have been no indictments filed as a result of any violation of civil rights in connection with the illegal wiretap against any individuals, although the government has also stated to me that some witnesses were called to the grand jury concerning that matter.

THE COURT: The government may stipulate, but what is its relevance as far as the proceeding before me is concerned?

MR. STONE: Well, there seemed to be a great
(286R)
deal of secrecy concerning these illegal wiretaps, and the reason for the secrecy was they were proceeding in a certain type of investigation, and I would argue to the Court that that argument was without merit because they have not proceeded diligently into getting any indictments as a result of that illegal wiretap; that there really isn't any reason I could fathom why they would have a reason

to conceal the identity from the United States Attorney considering they didn't go forward with any indictments to any of the individuals invovled.

MR. WALKER: Your Honor, I am not going to enter a stipulation in this area. I think this is irrelevant. It is clear there was an investigation. There has been testimony to that effect, and my understanding is, also talking to Mr. Mukasey, that witnesses were put in the grand jury. Now, I don't know, and I am not privy to the reasons for the fa ct that no indictment has been returned, there could be any number of reasons why an investigation has not yet returned an indictment. I don't know if the investigation is still ongoing. It may still be ongoing. I do think that that is irrelevant to the issues of this case.

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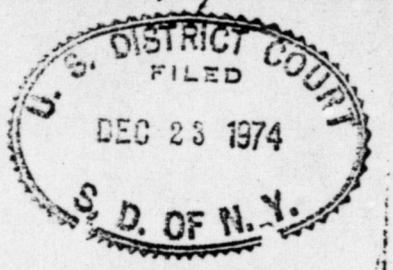

#41615

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PETER CORSO,	:	
Petitioner,	:	
-against-	:	74 Civil 720
UNITED STATES OF AMERICA,	:	OPINION
Respondent.	:	

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EDWARD WEINFELD, D. J.

Petitioner Peter Corso, also known as Peter Carbone, was convicted in February, 1972, by this court after a two-day nonjury trial on two counts: (1) possession with intent to distribute three kilograms of heroin; and (2) conspiracy to violate the narcotics laws.[1] He was sentenced on March 15, 1972 to five years imprisonment on each count, to run concurrently, to be followed by a special parole period of three years. He now moves pursuant to 23 U.S.C., section 2255, to vacate the judgment of conviction, to dismiss the indictment, or alternatively for a new trial.

Petitioner, originally appearing pro se, urged in the main violation of his right (1) to adequate legal representation during his trial and with respect to an appeal; (2) to due process of law based upon perjury committed by government witnesses; and (3) against unlawful search and seizure in the use of illegal wiretaps. The government, after exhaustive investigation, acknowledged the existence of unauthorized wiretaps but contended that

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(1) 21 U.S.C. §§ 846 and 841.

his arrest and subsequent conviction were not the result of those taps. It denied petitioner's other allegations and consented to a hearing limited to the issue of whether petitioner's conviction was tainted by the illegal wiretaps. Thereupon this court appointed counsel to represent petitioner and extended the scope of the hearing to embrace all of petitioner's claims. At the hearing, the claim of inadequate representation of counsel during his trial and upon appeal was withdrawn.(2)

To place petitioner's remaining claims in proper perspective, it is desirable first to summarize the trial testimony.

Petitioner was indicted together with Merritt C. Johnston for the substantive crime and conspiracy to commit it. Johnston, prior to trial, pled guilty and the case proceeded against petitioner as the sole defendant. The evidence established that Detective Louis D'Ambrosio of the New York City Police Force, in an undercover role

(2) Petitioner also challenged the indictment as duplicitous, but this claim is without substance. See United States v. Spada, 331 F.2d 995, 996 (2d Cir.), cert. denied, 379 U.S. 865 (1964), and cases cited therein.

as a narcotics purchaser, came into contact with Johnston. On September 30, 1971, in Johnston's apartment at 46-48 Downing Street, New York City, D'Ambrosio negotiated the purchase of three kilograms of heroin at $18,000 a kilo. In D'Ambrosio's presence, Johnston then made a phone call to his new "connection," asking "are there any more of the shirts that I had seen earlier available?" Johnston, after hanging up, informed D'Ambrosio he would be able to sell him the heroin. Thereafter, various conversations were had between Johnston and D'Ambrosio for its purchase and delivery. On October 5, 1971, at 1:15 p.m., D'Ambrosio again met Johnston at the latter's apartment. Johnston told D'Ambrosio the price now was $20,000 per kilogram, to which the latter agreed. After some discussion they arranged to consummate the sale in Johnston's apartment. Johnston then received a telephone call in D'Ambrosio's presence during which D'Ambrosio heard Johnston say "I have the man right here." When Johnston hung up, he said to D'Ambrosio "that's my man Carbone." Johnston told D'Ambrosio that Carbone would be at the apartment between 3 and 3:30 p.m. that afternoon "to deliver the merchandise" and that D'Ambrosio was to call him at 3:30 p.m. At 1:45 p.m.,

D'Ambrosio left Johnston's apartment and notified Detectives Joseph Nunziata and Octavio Pons, also of the New York Joint Task Force, of the impending delivery of the narcotics at Johnston's apartment.

The area where Johnston resided was placed under surveillance by Nunziata, Pons and others. At 3:30, petitioner Peter Corso, also known as Carbone, arrived by car at Johnston's building and parked nearby. He entered the building, soon emerged and, joined by Johnston, proceeded to a nearby food shop. They returned to Corso's parked car, where Corso opened the trunk of the car and slid a blue Air France travel bag in Johnston's direction. Johnston picked it up and both men proceeded to enter the foyer of Johnston's apartment house. At this point, Detectives Nunziata and Pons arrested the two men and took possession of the bag which contained six half kilogram packages of heroin.

The witnesses called by the prosecutor at the trial included Detectives D'Ambrosio, Nunziata and Pons, who testified to the foregoing events. Petitioner did not testify, nor did he present any witnesses. This court

found the defendant guilty, stating in its findings that the government's "evidence is substantial," as indeed it was.

The judgment of conviction is now challenged upon claims of violation of the constitutional rights already refarred to. Nunziata and D'Ambrosio at the trial upon cross-examination denied that there had been any wiretaps in this case. In fact, there had been two unauthorized wiretaps on Johnston's telephone, which both men were aware of at the time of the arrest. In addition, after the arrest but before petitioner's trial it appears that they learned of a third illegal tap, this one on Corso's telephone, placed by a different police unit.

The government contends, however, that petitioner's arrest and conviction are untainted by these three wiretaps -- that the information leading to his arrest was derived solely from the undercover negotiations between Detective D'Ambrosio and Johnston (petitioner's codefendant), and the surveillance observation by Nunziata and Pons shortly before and at the time of his arrest. Thus, the hearing was directed to three issues:

(1) whether Corso's arrest and conviction was based upon information obtained through the use of one or more of the illegal wiretaps;

(2) whether the failure of the government to disclose, pretrial, the existence of the wiretaps requires a new trial; and

(3) whether the perjury of government witnesses in denying knowledge of the existence of the wiretaps requires a new trial.

1. Was petitioner's arrest and conviction tainted by illegal wiretaps?

Shortly before and at the time of petitioner's arrest, and for some time thereafter, federal, state and local authorities were engaged in criminal investigations which, unknown to one another, pursued at times parallel and at times different lines of investigation. The United States Attorney for this district was engaged in one investigation that was directed towards police corruption in the New York City Police Department. At its center working with the federal authorities as an undercover agent was Robert Leuci, a New York City police detective. The federal investigation was so secretive that in the beginning

only two men on the staff of the United States Attorney were aware of it.

At the same time two other investigations were in progress; one by the New York City Joint Task Force, composed of federal, state and New York City enforcement officers, and another by the Special Investigative Unit of the New York City Police Department (SIU). The Joint Task Force focused its activities on Johnston while the SIU was concerned principally with Corso and his son-in-law Blass. Each group worked independently of the other; each on its own engaged in illegal wiretaps. We consider the activities of each in its relationship to this case.

(a) The New York City Joint Task Force Investigation -- the Aguiluz and Nunziata Wiretaps (on Johnston's Phone).

D'Ambrosio and Nunziata, New York City police officers, were members of the Joint Task Force. Carl Aguiluz, also a New York City police officer, was a member of a different unit, the SIU. At the time of the hearing of this motion, Nunziata was dead. Aguiluz testified that early in 1971, following receipt of information from Nunziata that Merritt Johnston was involved in narcotics

activities, he placed a wiretap on Johnston's telephone without obtaining a warrant. After Aguiluz reported negative results to Nunziata, the two-week old tap was discontinued. Aguilus further testified that at no time did he hear the name of Peter Corso or Carbone on the wiretap and it was discontinued at a time long before Detective D'Ambrosio had been introduced to Johnston.

D'Ambrosio testified that about mid-August, 1971, Nunziata told him that he had information on one Merritt Johnston. Soon thereafter D'Ambrosio was introduced to Johnston by an informant and he began his undercover activities with him. Prior thereto he was advised of the unproductive Aguiluz wiretap.

D'Ambrosio knew of another wiretap on Johnston's phone, this one illegally installed by Nunziata before the Aguiluz tap. D'Ambrosio testified that while he knew of the existence of Nunziata's tap, he had never heard any communication taken from it, nor did he have any other knowledge of it. D'Ambrosio admitted that his trial testimony denying knowledge of any wiretaps in this case was false, since he did know of the Aguiluz and Nunziata taps.

However, he denied any knowledge of any other taps and specifically said that during his undercover activities with Johnston he was unaware of any other wiretap, legal or illegal, that was in effect. Prior to his September 30 meeting with Johnston he had never heard the name Corso or Carbone.

There was a third wiretap in existence, this one on the telephone of Corso, which we now consider.

(b) The SIU Tap (on Corso's phone).

During the period D'Ambrosio was engaged in his undercover negotiations with Johnston, entirely unknown to him and members of his team, the Special Investigative Unit of the New York City Police Department was conducting an independent investigation of Corso and Jack Bless, a suspected narcotics trafficker. This group consisted of Detective Leuci and three others. In late September, Leuci's SIU group placed an illegal wiretap with monitoring and recording equipment on Corso's telephone in an effort to obtain information as to the narcotics activities of Bless and Corso. On October 5, 1971, (3)

(3) While there was no testimony as to the date, and the taps themselves do not reflect the date, the sequence of events

the SIU group overheard conversations on the wiretap between Corso and Bless about a three kilo narcotics transaction, delivery of which the investigators believed was to be made by Bless to Corso at a barber shop at 69th Street and Madison Avenue. They rushed there to intercept the transaction, but arrived too late. It was at or about that time Corso and Johnston, in possession of three kilos of heroin, were arrested by the Task Force Group.(4)

Leuci and his group were not aware of the

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footnote 3 cont'd -

referred to herein indicate these conversations took place on October 5, 1971, preceding Corso's arrest. There are also recordings of conversations between Bless and an unknown female in Corso's apartment which indicate they occurred on the same day subsequent to Corso's arrest.

(4) On the same day, following a conversation between Corso and Bless (but before the arrest), another conversation was monitored, this one between Corso and Johnston. In it Johnston referred to "three shirts," an expression used in the preceding conversation between Corso and Bless. In the illegal narcotics trade "shirt" is used for a "kilo." It is evident that both monitored conversations related to the sale of the heroin from Johnston to D'Ambrosio. Further, they indicate that Corso was the new "connection" to whom Johnston had referred in his talk with D'Ambrosio on September 30.

activities of the Task Force Group with respect to Johnston and did not learn of Corso's arrest until the evening of October 5th when they intercepted a telephone call from Bless to a female at the Corso apartment. As a result, in an effort to get information about the arrest, Leuci called the Task Force and for the first time was told that Nunziata and his group had arrested Corso earlier that day. Leuci testified that up to that time neither he nor any member of his group had shared any information derived from their illegal wiretap with any member of the Task Force. Indeed Leuci was both surprised and chagrined that his group had been in effect "beaten to the draw" by the Task Force's arrest of Corso earlier that day.

Since there were illegal wiretaps on Corso's phone, during which his two conversations with his co-defendant Johnston were overheard, the burden of proof is upon the government to establish that information derived therefrom was not the basis of Corso's arrest and his subsequent conviction on the narcotics charge.(5) Upon all

(5) Only two reels of wiretapped conversations were in existence at the time of the hearing. Both were derived from the Leuci-SIU tap but only one is material to the instant

the evidence I find that the government has sustained its burden of proof. It is clear that the Joint Task Force and the SIU units were conducting separate and independent investigations of suspected narcotics activities and that one group was not disclosing illicitly derived information to the other. In particular, the Corso-Johnston conversation overheard by Leuci and other members of the SIU unit concerning the "three shirts" that Johnston would sell to D'Ambrosio was not revealed to D'Ambrosio or other members of the Joint Task Force until after Corso and Johnston had been arrested. Additionally, the evidence establishes that the only sources of information upon which the arrests were made were: (1) D'Ambrosio's negotiations with Johnston, especially the October 5th conversation when

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footnote 5 cont'd

motion. Originally there were four reels of tape from the Leuci-SIU wiretap. Leuci turned these reels over to a Detective Lamattina who was under investigation by Leuci in connection with police extortion activities based upon the sale of incriminating tapes to persons whose conversations had been overheard. Leuci had made a copy of one of these four reels. The original of this reel and two others were destroyed by Lamattina, who inadvertently discovered that Leuci was engaged in undercover work for the United States Attorney's office. Lamattina failed to destroy the fourth tape which counsel for petitioner agreed was immaterial to this motion.

Johnston told him that Carbone would be at the apartment between 3 and 3:30 p.m. to deliver the narcotics; and (2) the surveillance observation thereafter of Corso and Johnston's activities by Munziata and other members of the Joint Task Force.

2. Does the failure of the government to disclose, pretrial, the existence of the wiretaps require a new trial?

Petitioner next contends that the newly discovered evidence of the existence of the illegal wiretaps, even though not the basis of his arrest, requires that the judgment of conviction be vacated and a new trial ordered. He argues that this is compelled because the government suppressed evidence in not disclosing the existence of the wiretaps.

Preliminarily, we consider the appropriate standard under which this claim is to be reviewed. The general standard governing motions for a new trial on the ground of newly discovered evidence is that (1) the evidence must have been discovered after trial, (2) must be material to the factual issues at the trial, (3) not merely cumulative or impeaching, and (4) must be of such a

character that it would probably produce a different verdict in the event of a retrial.(6)

Petitioner's burden of proof is significantly reduced where the newly discovered evidence was known to the prosecution at the time of trial but not disclosed.

If the prosecution's nondisclosure was inadvertent or did not involve evidence whose high value to the defense could not have escaped the government's notice, a petitioner is required to show that there is a significant chance that the evidence, developed by skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.(7)

However, where there is deliberate suppression

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(6) United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), cert. denied, 411 U.S. 982 (1973); United States v. DeSapio, 456 F.2d 644, 647 (2d Cir.), cert. denied, 406 U.S. 933 (1972); United States v. Polisi, 416 F.2d 573, 576-77 (2d Cir. 1969); United States v. Marquez, 363 F. Supp. 802, 805 (S.D.N.Y. 1973), aff'd on opinion below, 490 F.2d 1383 (2d Cir.), cert. denied, 43 U.S.L.W. 3208 (U.S., Oct. 15, 1974).

(7) United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), cert. denied, 411 U.S. 982 (1973); United States v. Mayersohn, 452 F.2d 521, 526 (2d Cir. 1971); United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969).

of evidence by the prosecution, a new trial is required if the evidence is merely favorable or material to the defense.[8] The same rule applies where it appears that the high value to the defense of the undisclosed evidence could not have escaped the prosecutor's attention, even without a demonstration that the evidence was deliberately suppressed.[9] Accordingly, where it appears that the prosecution deliberately suppressed evidence or that the undisclosed evidence is of such high value that it could not have escaped the government's attention, the "materiality" of the evidence to the petitioner is measured by the effect of its nondisclosure upon his trial preparation rather than upon its probable impact upon the jury.[10]

Against this background of applicable law, we

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(8) Giglio v. United States, 405 U.S. 150, 153-54 (1972); Brady v. Maryland, 373 U.S. 83 (1963); United States v. Kahn, 472 F.2d at 287.

(9) United States v. Kahn, 472 F.2d at 287; United States v. Polisi, 416 F.2d 573, 576-77 (2d Cir. 1969); United States v. Keogh, 391 F.2d 138, 146-47 (2d Cir. 1968).

(10) United States v. Kahn, 472 F.2d at 287; United States v. Polisi, 416 F.2d at 576-77; United States v. Bonanno, 430 F.2d 1060, 1063 (2d Cir.), cert. denied, 400 U.S. 964 (1970).

consider petitioner's claim with respect to the nondisclosure of the wiretaps. Here a distinction must be borne in mind between the Aguiluz-Nunziata taps and the SIU-Leuci wiretap, and also between the differing roles of those on the prosecution staff. John M. Walker, Jr., Assistant United States Attorney, was in charge of and prosecuted the case against Corso which resulted in his conviction here under attack. As already noted, the investigation by the United States Attorney into alleged corruption in the New York City Police Department was highly secretive, was kept separate and apart from the main work of the United States Attorney's office, and much of its activities were conducted away from his official office to preserve its secrecy. Special Assistant United States Attorney Nicholas Scopetta and Assistant United States Attorney Edward M. Shaw were in charge of the investigation, and Leuci, acting on behalf of the United States Attorney's office in his undercover capacity, reported to them.

First, as to the Aguiluz-Nunziata taps on Johnston's telephone, there is no evidence, not the slightest, that any one in the United States Attorney's office knew of these taps at the time of trial. In the absence of knowledge, direct

or imputed, by any member of the prosecution staff of their existence, there can be no claim of deliberate or inadvertent suppression of evidence by the prosecution. Thus, in this instance the issue is whether, had petitioner known of them, it would probably have produced a different verdict. Here the petitioner contends his counsel would have fashioned a different strategy with a reasonable probability of affecting the result. However, applying the more liberal standard favoring motions for a new trial on the ground of newly discovered evidence known to the prosecution but not disclosed through inadvertence, had the existence of these taps been known to the defendant it could in no way have affected the trial outcome.(11) The taps had been removed a month before Corso's arrest. They had been nonproductive and were not in existence at the time of the trial. Perhaps counsel could have attacked the credibility of Munziata for his illegal wiretapping activity. He also could have cross-examined him and D'Ambrosio to impugn their credibility in view of their

(11) See United States v. Munchak, 338 F. Supp. 1283, 1293 (S.D.N.Y. 1972), aff'd on opinion below, 460 F.2d 1407 (2d Cir.), cert. denied, 409 U.S. 915 (1973).

sworn denials at the trial.(12) But this collateral attack could not overcome the substantial evidence that Corso and Johnston were seen removing the travel bag containing the heroin from Corso's car and that both possessed the heroin at the time of their arrest. All of this was observed by Detective Pons, who corroborated Nunziata. This evidence was most compelling. Thus, knowledge of the Aguilus-Nunziata taps would not have had the slightest bearing on the issue of petitioner's guilt or innocence. Its use by skilled counsel, whether for trial preparation, trial strategy or impeachment purposes, would have been of inconsequential value in negating the essential elements of the crime.

The SIU-Leuci tap presents a different situation. While Assistant United States Attorney Walker, the trial prosecutor, did not know of this wiretap at the time of trial, Shaw and Scopetta by that time had been informed

(12) If the Assistant United States Attorney knew at the time of trial that a government witness was testifying falsely, his duty was to correct the false testimony. The prosecutor's knowing use of false testimony, even if it only goes to credibility, violates due process. Napue v. Illinois, 360 U.S. 264 (1959); United States v. Kaplan, 470 F.2d 100 (7th Cir. 1972), cert. denied, 410 U.S. 966 (1973).

by Leuci that the SIU had a tap on a relative of Jack Bless. Both Scopetta and Shaw testified at the hearing of this motion that they did not recall whether they had been informed that this relative was Corso or Carbone, the petitioner herein. In any event, they did not associate the tap with Corso, one of the defendants in the federal prosecution. Indeed, they were unaware that any case against him was pending in this court. However, inter-office memoranda with respect to the SIU-Leuci wiretap activities contain Corso's name, address and his alias, Carbone. These were known to Scopetta and Shaw. The record warrants a finding that both were aware that a wire-tap had been placed on Corso's phone, but because of the highly secretive nature of their investigation, they did not by the time of trial disclose this to other members of the staff of the United States Attorney, particularly to Walker, the trial prosecutor. The prosecutor's office failed to let "the left hand know what the right hand was doing."[13] However, despite this lack of communication among members of the prosecution staff, Shaw and Scopetta's knowledge of the SIU-Leuci tap must be attributed to the

(13) Santobello v. New York, 404 U.S. 257, 262 (1971).

prosecution as a whole.[14] Since Walker, the trial prosecutor, was unaware of the Corso tap and Shaw and Scopetta were unaware of Corso's prosecution, there is no basis for any claim of deliberate suppression. In this situation, the failure to disclose the existence of the tap was inadvertent. Accordingly, the standard to be applied is whether there is a significant chance that this evidence could have been developed so as to have brought about a different result.[15] Petitioner has failed to satisfy this standard.

The SIU-Lauci tap not only would not have been helpful to petitioner but, to the contrary, would have been most damaging to him, since the conversations that were recorded are incriminating of Corso and Johnston and not exculpatory. If anything, had they been admissible upon the trial they would have corroborated the government's case. At best, as in the instance of the Aguiluz-Nunziata tape, petitioner could have utilized knowledge of this tap

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(14) Giglio v. United States, 405 U.S. 150 (1972); Santobello v. New York, 404 U.S. 257 (1971); United States ex rel. Rice v. Vincent, 491 F.2d 1326 (2d Cir. 1970).

(15) Note 6 supra.

for impeachment purposes. But such an attack, even by the most skilled cross-examiner, could not negate the essential facts touching upon the basic issue of petitioner's guilt or innocence. It could not, in the slightest degree, overcome the unimpeached and uncontradicted eyewitness testimony of Detective Pons, who observed D'Ambrosio in his undercover capacity leave Johnston's apartment where the terms of sale and delivery of the heroin had been agreed upon, followed soon thereafter by Corso's appearance upon the scene, then Johnston joining him, and both caught redhanded in possession of the heroin. In sum, knowledge of the existence of the SIU-Leuci wiretap would not have had the slightest effect upon the court's finding of guilt. Ordinarily the issue is whether the newly discovered evidence could "in any reasonable likelihood have affected the judgment of the jury . . . ."(16) In this instance of a bench trial, greater certitude of judgment can be expressed. Here, it surely would not have made the slightest difference in the result.

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(16) Napue v. Illinois, 360 U.S. 264, 271 (1959).

3. Does the perjury of government witnesses in denying knowledge of the wiretaps require a new trial?

However deplorable it is that Nunziata and D'Ambrosio committed perjury with respect to the wiretaps, as noted above, no basis exists to attribute actual knowledge of such perjury to any member of the staff of the United States Attorney. Indeed, this is acknowledged by petitioner. In the absence of prosecutorial misconduct, and it further appearing that the false testimony is not material to the issue of guilt, there is no basis for granting a new trial.(17)

The motion is denied in all respects.

Dated: New York, N. Y.
December 23, 1974

EDWARD WEINFELD
United States District Judge

(17) See Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. DeSapio, 435 F.2d 272, 286 n.14 (2d Cir. 1970), cert. denied, 402 U.S. 999 (1971); United States v. Rosner, ___ F. Supp. ___ (72 Cr. 782, S.D.N.Y., Aug. 15, 1974); United States v. Marquez, 363 F. Supp. at 806.

Joseph I Stein
affirms that on
4/9/75 I sent
a copy of Brief + appendix to
Paul J Curran
US Attorney

Joseph Stein